

AMENDED IN ASSEMBLY APRIL 14, 2005

CALIFORNIA LEGISLATURE—2005–06 REGULAR SESSION

ASSEMBLY BILL

No. 1133

Introduced by Assembly Member Harman

February 22, 2005

An act to amend Section 2028.050 of the Code of Civil Procedure, and to amend, *repeal, and add* Section 912 of the Evidence Code, relating to evidentiary privileges.

LEGISLATIVE COUNSEL'S DIGEST

AB 1133, as amended, Harman. Evidentiary privileges.

(1) Under existing law, a party who objects to any written deposition question on the ground that it calls for information that is privileged or is protected work product shall serve a specific objection to that question on all parties entitled to notice of the deposition within 15 days or the objection is waived.

This bill would authorize the court, on motion, to relieve a party from this waiver on the court's determination that the party has subsequently served an objection and that the party's failure to serve a timely objection was the result of mistake, inadvertence, or excusable neglect.

(2) Under existing law, the right of any person to claim certain evidentiary privileges is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure.

This bill would provide, *until January 1, 2009*, that the right of any person to claim these evidentiary privileges is waived with respect to

a communication protected by the privilege if any holder of the privilege, without coercion, has intentionally disclosed a significant part of the communication or has consented to disclosure made by anyone. The bill would further provide that consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating intent to permit the disclosure. The bill would authorize the court, when the holder of the privilege waives the privilege as to a significant part of a confidential communication, to order disclosure of another part of the communication or a related communication to the extent necessary to prevent unfairness from partial disclosure.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 2028.050 of the Code of Civil
2 Procedure is amended to read:
3 2028.050. (a) A party who objects to any question on the
4 ground that it calls for information that is privileged or is
5 protected work product under Chapter 4 (commencing with
6 Section 2018.010) shall serve a specific objection to that question
7 on all parties entitled to notice of the deposition within 15 days
8 after service of the question. A party who fails to timely serve
9 that objection waives it. The court, on motion, may relieve a
10 party from a waiver under this subdivision on the court's
11 determination that the party has subsequently served an objection
12 in substantial compliance with this subdivision and that the
13 party's failure to serve a timely objection was the result of
14 mistake, inadvertence, or excusable neglect.
15 (b) The party propounding any question to which an objection
16 is made on grounds of privilege or work product may then move
17 the court for an order overruling that objection. This motion shall
18 be accompanied by a meet and confer declaration under Section
19 2016.040. The deposition officer shall not propound to the
20 deponent any question to which a written objection on those
21 grounds has been served unless the court has overruled that
22 objection.
23 (c) The court shall impose a monetary sanction under Chapter
24 7 (commencing with Section 2023.010) against any party,

1 person, or attorney who unsuccessfully makes or opposes a
2 motion to overrule an objection, unless it finds that the one
3 subject to the sanction acted with substantial justification or that
4 other circumstances make the imposition of the sanction unjust.

5 SEC. 2. Section 912 of the Evidence Code is amended to
6 read:

7 912. (a) Except as otherwise provided in this section, the
8 right of any person to claim a privilege provided by Section 954
9 (lawyer-client privilege), 980 (privilege for confidential marital
10 communications), 994 (physician-patient privilege), 1014
11 (psychotherapist-patient privilege), 1033 (privilege of penitent),
12 1034 (privilege of clergy member), 1035.8 (sexual assault
13 counselor-victim privilege), or 1037.5 (domestic violence
14 counselor-victim privilege) is waived with respect to a
15 communication protected by the privilege if any holder of the
16 privilege, without coercion, has intentionally disclosed a
17 significant part of the communication or has consented to
18 disclosure made by anyone. Consent to disclosure is manifested
19 by any statement or other conduct of the holder of the privilege
20 indicating intent to permit the disclosure, including failure to
21 claim the privilege in any proceeding in which the holder has the
22 legal standing and opportunity to claim the privilege.

23 (b) Where two or more persons are joint holders of a privilege
24 provided by Section 954 (lawyer-client privilege), 994
25 (physician-patient privilege), 1014 (psychotherapist-patient
26 privilege), 1035.8 (sexual assault counselor-victim privilege), or
27 1037.5 (domestic violence counselor-victim privilege), a waiver
28 of the right of a particular joint holder of the privilege to claim
29 the privilege does not affect the right of another joint holder to
30 claim the privilege. In the case of the privilege provided by
31 Section 980 (privilege for confidential marital communications),
32 a waiver of the right of one spouse to claim the privilege does not
33 affect the right of the other spouse to claim the privilege.

34 (c) A disclosure that is itself privileged is not a waiver of any
35 privilege.

36 (d) A disclosure in confidence of a communication that is
37 protected by a privilege provided by Section 954 (lawyer-client
38 privilege), 994 (physician-patient privilege), 1014
39 (psychotherapist-patient privilege), 1035.8 (sexual assault
40 counselor-victim privilege), or 1037.5 (domestic violence

1 counselor-victim privilege), when disclosure is reasonably
2 necessary for the accomplishment of the purpose for which the
3 lawyer, physician, psychotherapist, sexual assault counselor, or
4 domestic violence counselor was consulted, is not a waiver of the
5 privilege.

6 (e) If the holder of a privilege waives the privilege as to a
7 significant part of a confidential communication pursuant to
8 subdivision (a), the court may order disclosure of another part of
9 the communication or a related communication to the extent
10 necessary to prevent unfairness from partial disclosure.

11 (f) This section applies only to the privileges identified in
12 subdivision (a). It implies nothing regarding waiver of any other
13 privilege.

14 (g) *This section shall remain in effect only until January 1,*
15 *2009, and as of that date is repealed, unless a later enacted*
16 *statute that is enacted on or before January 1, 2009, deletes or*
17 *extends that date.*

18 SEC. 3. Section 912 is added to the Evidence Code, to read:

19 912. (a) *Except as otherwise provided in this section, the*
20 *right of any person to claim a privilege provided by Section 954*
21 *(lawyer-client privilege), 980 (privilege for confidential marital*
22 *communications), 994 (physician-patient privilege), 1014*
23 *(psychotherapist-patient privilege), 1033 (privilege of penitent),*
24 *1034 (privilege of clergyman), 1035.8 (sexual assault*
25 *counselor-victim privilege), or 1037.5 (domestic violence*
26 *counselor-victim privilege) is waived with respect to a*
27 *communication protected by the privilege if any holder of the*
28 *privilege, without coercion, has disclosed a significant part of the*
29 *communication or has consented to disclosure made by anyone.*
30 *Consent to disclosure is manifested by any statement or other*
31 *conduct of the holder of the privilege indicating consent to the*
32 *disclosure, including failure to claim the privilege in any*
33 *proceeding in which the holder has the legal standing and*
34 *opportunity to claim the privilege.*

35 (b) *Where two or more persons are joint holders of a privilege*
36 *provided by Section 954 (lawyer-client privilege), 994*
37 *(physician-patient privilege), 1014 (psychotherapist-patient*
38 *privilege), 1035.8 (sexual assault counselor-victim privilege), or*
39 *1037.5 (domestic violence counselor-victim privilege), a waiver*
40 *of the right of a particular joint holder of the privilege to claim*

1 *the privilege does not affect the right of another joint holder to*
2 *claim the privilege. In the case of the privilege provided by*
3 *Section 980 (privilege for confidential marital communications),*
4 *a waiver of the right of one spouse to claim the privilege does not*
5 *affect the right of the other spouse to claim the privilege.*

6 *(c) A disclosure that is itself privileged is not a waiver of any*
7 *privilege.*

8 *(d) A disclosure in confidence of a communication that is*
9 *protected by a privilege provided by Section 954 (lawyer-client*
10 *privilege), 994 (physician-patient privilege), 1014*
11 *(psychotherapist-patient privilege), 1035.8 (sexual assault*
12 *counselor-victim privilege), or 1037.5 (domestic violence*
13 *counselor-victim privilege), when disclosure is reasonably*
14 *necessary for the accomplishment of the purpose for which the*
15 *lawyer, physician, psychotherapist, sexual assault counselor, or*
16 *domestic violence counselor was consulted, is not a waiver of the*
17 *privilege.*

18 *(e) This section shall become operative on January 1, 2009.*